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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 563

MALCOLM SCHAEFFER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Malcolm Schaeffer, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on July 15, 1965.

### Opinion Below

The opinion of the court below (*infra* Appendix A, pp. 1a to 14a) has not yet been reported.

### Jurisdiction

The judgment of the Court of Appeals was entered on July 15, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

## Questions Presented

1. Whether it was prejudicial error for the Trial Judge during his instructions to the jury to recapitulate and emphasize the testimony of the principal witness produced by the Government.

2. Where a vital issue at the trial is the defense of entrapment, was it prejudicial error for the Court to charge that the law recognized lawful and unlawful entrapment?

## Constitutional Provisions and Statutes Involved

1. The FIFTH AMENDMENT provides, *inter alia,* that—
No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process, of law; * * *

2. THE SIXTH AMENDMENT provides, *inter alia,* that—
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

3. TITLE 18, UNITED STATES CODE:

§2. *Principals*

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

4. TITLE 18, UNITED STATES CODE.

"201. *Bribery of public officials and witnesses*

(a) For the purpose of this section:
'public official' means Member of Congress, or Resident Commissioner, either before or after he

has qualified, or an officer or employee or person acting for on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

'person who has been selected to be a public official' means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(d) Whoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony or with intent to influence such person to absent himself therefrom; or

(e) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom—

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or

because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom; or

(i) Whoever, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given or to be given by him as a witness upon any such trial, hearing, or other proceeding, or for or because of his absence therefrom—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(j) Subsections (d), (e), (h), and (i) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(k) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title. Added Pub.L. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1119."

5. TITLE 18, UNITED STATES CODE:

"§202. *Definitions*

(a) For the purpose of sections 203, 205, 207, 208, and 209 of this title the term 'special Government employee' shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, or a part-time United States Commissioner. Notwithstanding the next preceding sentence, every person serving as a part-time local representative of a Member of Congress in the Member's home district or State shall be classified as a special Government employee. Notwithstanding section 29 (c) and (d) of the Act of August 10, 1956 (70A Stat. 632; 5 U. S. C. 30r (c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Re-

serve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms 'officer or employee' and 'special Government employee' as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

(b) For the purposes of sections 205 and 207 of this title, the term 'official responsibility' means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action. Added Pub.L. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1121."

6. TITLE 18, UNITED STATES CODE:

§281. *Compensation to Members of Congress, officers and others in matters affecting the Government*

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, of-

ficer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress. As amended May 24, 1949, c. 139, §6, 63 Stat. 90."

7. TITLE 18, UNITED STATES CODE:

"§371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

## Statement

This is a criminal proceeding under Sections 2, 202, 281 and 371 of 18 U. S. C.

The parties involved are defendant, William J. Laverick, a former Government employee, in charge of a department at Fort Monmouth, New Jersey, whose responsibility it was to certify the technical ability and plant capacity of firms bidding on Signal Corps' contracts and to approve any technical changes in contract specifications. The approval of this department was a prerequisite to receiving an award. Defendant, Harrison F. Tryon, was chief of the Logistics Engineering Division at Fort Monmouth and was a direct subordinate of Laverick's, as well as the custodian of lists containing the specifications of all component parts used in these contracts. Defendant, Malcolm Schaeffer, was a former employee of Laverick's department and later a manufacturer's representative of Consad, Inc., in their attempts to secure contracts with the Government at Fort Monmouth, New Jersey, from March through May 26, 1962, when a retainer of $250.00 per month was cancelled, but nevertheless, Consad continued getting in touch with him thereafter. Consad, Inc. was an electronic components manufacturer which had, at the time of the alleged crime, a series of bids pending before the Signal Corps at Fort Monmouth, New Jersey. Consad, Inc. had experienced great difficulty in obtaining Government contracts because of its inability to convince the Signal Corps of its capacity to manufacture the finished product.

The facts, briefly stated, are as follows:

Robert Snoyer, the president of Consad, Inc., was the principal witness called by the Government. His testimony

was that on June 6, 1962 was in New York City when he received a wire from his office in Santa Monica, California concerning a certain bid his company then had pending at Fort Monmouth, New Jersey. In order to obtain the requested information, Snoyer attempted to get in touch with his Santa Monica plant, as well as his Monterey plant in California, but was unable to find anyone at either place who could give him the requisite information. He then called the defendant, Schaeffer, at Fort Monmouth, and told him of the wire he had received, and asked him to check into the matter and see if he could identify the equipment. Schaeffer called back, identifying the equipment, which had an established value of approximately $2,500,000, and Schaeffer indicated that Snoyer would have the same difficulty he had had in the past with the people at Fort Monmouth, and told him that if he hoped to obtain any business, he would need the help of certain people at Fort Monmouth, and that for a fee of 2% of the contract price he could expect to receive all the approvals necessary to obtain the contract. Snoyer told him that he would want to meet the principals involved who could deliver the contract and the approvals. Schaeffer told Snoyer that he would come to New York the next morning and he would introduce him to Laverick who was the one who could be most helpful in securing the contract. Schaeffer came to New York on June 7, 1962 and he and Snoyer drove down to Laverick's home and there Snoyer asked Laverick to confirm Schaeffer's statement that what he told him was true and Laverick replied, indicating Schaeffer, "You do what Muggsy tells you to do and everything will be O.K. * * *" To this, Snoyer answered, "All right." Later, when they were about to leave, Snoyer being somewhat doubtful about the money concerned, since on the way down to Laverick's

home Schaeffer had reduced the price from 2% of $2,500,000, or $48,000.00, to $20,000.00 as the amount of the payment, and thereafter asked Schaeffer whether Laverick knew about this and was still willing to go through with the deal. Schaeffer thereupon walked apart from Snoyer and whispered something to Laverick which Snoyer testified he could not overhear, but that he heard Laverick's reply, "Yes, you're damn right I will", and Schaeffer, upon returning to Snoyer came back and said, "You heard him, so everything is O.K."

Schaeffer then drove Snoyer to Philadelphia, and on the way over, he advised Snoyer to call him the next day and he would tell him what he had to do in California, in order to pass the survey which was necessary for the approval of the contract. Schaeffer and Snoyer also had a discussion on how the tax problem on the money to be paid should be avoided and Schaeffer advised Snoyer that it would be necessary for him to take care of his (Schaeffer's) taxes, inasmuch as Schaeffer insisted that the money was to be paid directly to him and he would make the proper disposition thereof.

From Philadelphia, Snoyer proceeded to Washington, where he related the above story to one Nicodemus, a newspaper reporter, who had been making a study of procurement orders, who told him to contact the F.B.I., which Snoyer did, and, after five hours discussion with the F.B.I., Snoyer left for California, without signing any statement of the conversation which had ensued.

Snoyer called the next day and was told by Schaeffer that he was sending some documents to him which would be very helpful for the company when the survey team came from Fort Monmouth and arrived at Consad's plant. After

Snoyer's arrival in California, he was contacted by the F.B.I. of Los Angeles, and he reported to them that he had received a package from Schaeffer which he brought to the Santa Monica office of the F.B.I. and it was found to contain some provisioning lists and item description lists taken from Signal Corps' files. Further testimony showed that these lists were not open to the public, were confidential, and were given to the defendant, Laverick, by the defendant, Tryon, through Tryon's secretary.

After the receipt of these documents by Consad in California, which were sent by Schaeffer and taken to the office of the F.B.I., a series of telephone conversations were had between Schaeffer and Snoyer, which were recorded by the F.B.I. as well as telephone conversations between Snoyer and Laverick and Snoyer and Tryon. These conversations occurred between June 14 and July 11, and during one such conversation between Schaeffer and Snoyer, Schaeffer advised Snoyer that he should bring East with him between $4,500.00 and $5,000.00 in cash to be paid by Schaeffer to four people at Fort Monmouth. Snoyer, however, wanted to meet the principals to whom the money was to be paid and Schaeffer was unwilling, saying that he would distribute the same. However, Snoyer withdrew $3,000.00 from the bank and came East with Agent Stein of the F.B.I., the money being identified at the Newark office of the F.B.I., and placed in envelopes, one of which contained an amount of $850.00, the other $750.00.

Between June 8 and June 12, a survey team, under one Mayerson, visited the Consad plant in California, and made a technical ability evaluation to determine whether it could technically produce the equipment upon which it had bid. A report was filed by the survey team, under

Mayerson, stating that Consad was not qualified, and Laverick though he had authority to overrule the report, did not do so. Snoyer, at this time, was unaware of this conduct on Laverick's part. The Contractor Evaluation Board, the highest authority with respect to contracts of this nature, also approved the report. Later, Snoyer, upon learning of the unfavorable report which the survey team had made, was assured on or about June 15, by Schaeffer that certain of the information of the survey team was in error and told Snoyer, "Well, don't worry about that because Bill will overrule them. Don't concern yourself with it." He also advised Snoyer that there were various details that were wrong with Consad's facilities and that was the reason they could not give technical approval, but Schaeffer again assured Snoyer, "* * * that these people would be overruled."

An F.B.I. Agent, Colby, testified to a telephone conversation between Snoyer and Tryon on June 20, in which Tryon stated he was familiar with the entire matter and that he would be able to help Consad after the award was made and that he had already helped, to some extent, with Schaeffer. On July 12, 1962 arrangements were made by Schaeffer for Snoyer to have dinner at the Shadow-Brook Restaurant in Shrewsbury, New Jersey with Tryon and Laverick and other Fort Monmouth personnel. Snoyer testified, however, that at this meeting Laverick assured Snoyer that the Small Business Administration, which had authority to overrule everything which had gone on before, would grant Consad a Certificate of Competency. He, additionally, assured Snoyer that he was helping all he could with Consad, as was Tryon, and when they had secured the contract, he would make it profitable by ordering

spare parts. Snoyer testified that out of the presence of the other persons, he showed Schaeffer the cash he had brought by exhibiting the envelopes containing the cash to him. Schaeffer, likewise, knew at this meeting that the survey team had reported that Consad was technically unqualified to perform the work under their bid. Later in the evening at the Shadow-Brook Restaurant, when Snoyer visited the men's room with Laverick, upon leaving he handed one of the envelopes to Laverick which contained the cash and asked him if he thought he deserved it and Laverick said, "Yes." Later, Snoyer took the defendant, Tryon, aside in the bar, showed him the envelope with the money in it and asked him if he thought he deserved it and he answered, "Yes." Snoyer then gave the envelope to him and Tryon folded it and put it in his pocket. Immediately upon defendants leaving the restaurant, they were arrested which, as has been indicated, was on July 12, 1962.

This evidence was presented to the jury, the defendants moved for judgments of acquittal after the Government's case and also after their own case had been presented and both of these motions were denied. After summation of counsel, the case was submitted to the jury which rendered a verdict for the Government and against all three defendants. A motion for a new trial was denied on February 26, 1964. Appeal was taken to the United States Court of Appeals for the Third Circuit and the judgments of the trial court were affirmed.

## Reasons for Granting the Writ

The questions presented by this case are major issues dealing with the administration of criminal justice in the Federal Courts. In essence, they involve the standards of fairness to be acknowledged as the responsibility of all parties in a federal criminal trial.

**1. The comment upon the evidence by the Court during the course of the instructions to the jury.**

This Court has previously spoken on the subject of the propriety of a trial judge commenting upon the evidence during the course of a criminal trial. In 1933, the Court decided *Quercia* v. *United States*, 289 U. S. 466 (1933) and *United States* v. *Murdock*, 290 U. S. 389 (1933). Those cases established a general rule which has been quoted at length ever since in appellate decisions throughout the country.

> "In a trial by jury in a Federal Court, the Judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."

*Quercia* v. *United States*, 289 U. S. 466, 469 (1933); *United States* v. *Curzio*, 170 F. 2d 354, 357 (3rd Cir., 1948); *United States* v. *Rutkin*, 189 F. 2d 431, 440 (3rd Cir., 1951); affirmed on other grounds 343 U. S. 130 (1952), see also *United States* v. *Gollin*, 166 F. 2d 123, 127 (3rd Cir.), cert. den. 333 U. S. 875 (1948); *Sullivan* v. *United States*, 178 F. 2d 723 (D. C. Cir., 1949); *Billeci* v. *United States*, 184 F. 2d 394, 402 (D. C. Cir., 1950); *United States* v. *Link*, 202 F. 2d 592 (3rd Cir., 1953); *Blunt* v. *United States*, 244 F. 2d 355, 365 (D. C. Cir., 1957); *Buchanan* v. *United States*, 244 F. 2d 916, 919 (6th Cir., 1957); *Benes* v. *United States*, 276 F. 2d 99, 102 (6th Cir., 1960); *United States* v. *Kravitz*, 281 F. 2d 581 (3rd Cir., 1961), cert. den. 364 U. S. 941 (1961).

It is, of course, commonplace learning that the right of a federal trial judge to comment on the evidence is not unlimited. *Quercia* v. *United States*, 289 U. S. 466 (1933). The serious problem, however, is how the power is to be limited and yet allowed.

There is no question that the influence of the trial judge upon the jury is of great weight and his every word is received with deference and may prove controlling. In his instructions to the jury the trial judge gives to the jury the last words they hear before their deliberation.

If, as here, the trial has been a long one and the issues complicated the jury will naturally turn to the lone "neutral or unbiased" person in the courtroom. The one person in whom they can place their trust in their efforts to fulfill their sworn duty is in their opinion the trial judge. Therefore, when the court comments upon the evidence, all pre-conceived notions or opinions of the jurors are more than likely disregarded and they strain to glean from his words the indications which they desire.

It would be most unrealistic to assume that the jury would not be swayed by a recital of the facts as given by the judge regardless of how many times he recites the ritual like phrases "* * * you as jurors are the sole judges of the facts." (79a) and "* * * if your recollection of the testimony differs from mine you are to rely on your own recollections." (109a).

It is submitted that it is time in our society to eliminate procedures from criminal trials wherein powers far beyond those present in even the most endowed of human beings are assumed to be present in the average juror.

What positive function is to be performed by placing an additional burden upon the jury as it commences its deliberations? As he leaves the jury box, the conscientious juror must be in a serious quandry, not only must he recall the evidence of a long trial peppered with interruptions and immaterial colloquy but he must apply an in-

volved and sometimes conflicting series of legal principles to that evidence. In addition, when the trial judge chooses to comment upon the evidence the juror must first resolve whatever conflicts may exist between his recollection of the testimony (without benefit of notes) and the court's recitation of the testimony (obviously read from notes taken during the trial). It does not take undue speculation to assume that any sensible and reasonable juror will accept the "recollection" of the court without question. If the court is expert and unbiased then, perhaps, no harm is done but if the court is subject to human frailty or error, who can decide what real harm is caused. Except in extremely aggravated cases the reviewing courts are reluctant to speculate upon the causes of a jury verdict.

The cases such as *Quercia* v. *United States,* 289 U. S. 466 (1933); *United States* v. *Marzano,* 149 F. 2d 923 (2d Cir., 1945); *Billeci* v. *United States,* 184 F. 2d 394 (D. C. Cir., 1950); *Buchanan* v. *United States,* 244 F. 2d 916 (6th Cir., 1957) and *Blunt* v. *United States,* 244 F. 2d 353 (D. C. Cir., 1957) are comparatively easy to decide. It is the borderline case such as the one herein which creates the problem. Who can say whether the jury made its decision upon a full consideration of all of the evidence which was before it or made its decision upon the summary with which it was supplied by the court?

In this case, there was a clear conflict between the versions of the facts as testified to by the witnesses produced by the government and those produced by the defendants. The trial took seventeen trial days and yet the court left the jury with a capsule version of the testimony which in part oversimplified the position of the prosecution and in

part ignored certain aspects of the defense. The comments took no more than 15 or 20 minutes for the court to accomplish and came near the end of the charge.

It is submitted that it is time to expand the language of the District of Columbia Circuit in *Billeci* v. *United States*, 184 F. 2d 394, 403 (D. C. Cir., 1950).

> "The accused has a right to a trial by the jury. That means his guilt or innocence must be decided by twelve laymen and not by one judge. A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that the courts have held time and time again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused."

The urged expansion would be to prohibit the court from giving the jury a capsule summary of the evidence, based upon written notes or recollections of the court.

In this case, the court effectively took the determination of the ultimate facts away from the jury and gave them instead a slanted version albeit one which was prefaced with the old standard cautionary instructions that the jury was the sole judge of the facts, etc. No reasoning person could seriously contend that the jury would freely disregard the account.

**2. The instruction of the Court concerning "lawful or unlawful entrapment".**

The Court charged, in part, as follows:

> "By way of summary as to this defense of entrapment, I charge you that the law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment." (97a)

It is respectfully submitted that such a statement, particularly when offered as a summary of what has preceded it, can serve only to confuse and befuddle a jury for it essentially constitutes a contradiction in terms. It is respectfully submitted that there is no such thing as a "lawful entrapment" for by its very definition, if there is an "entrapment" it is of necessity illegal and unlawful. Thus, as stated in *Sherman* v. *United States,* 356 U. S. 369 (1958), "Entrapment occurs only when the criminal conducts was the product of the creative activity of law enforcement officials."

It may well be the case that there are reported decisions which use the terms "lawful entrapment" and "unlawful entrapment". But if such be the case it must be borne in mind that such decisions are written for the benefit and edification of the Bench and Bar and not for jurors. Further, it is respectfully submitted, a reading of the decisions on entrapment, even by one trained in the Law, leads one to the conclusion that there are indeed other areas of the law which are far easier to comprehend than this difficult subject which has vexed both courts and lawyers alike.

To make the subject even more confusing for the jury the court then continued its summary by stating that one

induced or persuaded by a law enforcement officer to commit a crime was entitled "to the defense of unlawful entrapment * * *" (97a). It is respectfully submitted that a defendant so induced was entitled to an *acquittal!* As stated by the court the jury could well understand that if it found that a law officer induced the defendants to commit a crime it should then consider the "defense of unlawful entrapment". This is an example of what occurs when improper terms are loosely used.

## CONCLUSION

**The Petitioner was denied a fair trial by a jury as a result of the trial court's delivering an incomplete summary of the evidence to the jury and as a result of the trial court's erroneous instructions concerning the law of entrapment. The Petitioner therefore prays that a Writ of Certiorari be granted.**

Respectfully submitted,

VAN RIPER & BELMONT
By FREDERIC C. RITGER, JR.
744 Broad Street
Newark, New Jersey
*Counsel for Petitioner*

[APPENDICES FOLLOW]

# APPENDIX A

## Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NOS. 14874, 14875 AND 14876

---

UNITED STATES OF AMERICA,

*v.*

WILLIAM J. LAVERICK,
HARRISON F. TRYON and
MALCOLM SCHAEFFER.

WILLIAM J. LAVERICK,
Appellant in No. 14874

HARRISON F. TRYON,
Appellant in No. 14875

MALCOLM SCHAEFFER,
Appellant in No. 14876

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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Argued November 19, 1964

Before: STALEY, GANEY and FREEDMAN, *Circuit Judges.*

## *Appendix A*

OPINION OF THE COURT

(Filed July 15, 1965)

By GANEY, *Circuit Judge.*

This consolidated appeal comes before the Court for review of the conviction of three defendants under Sections 2, 202, 281 and 371 of Title 18, United States Code.[1]

The parties involved are defendant, William J. Laverick, a former Government employee, in charge of a department at Fort Monmouth, New Jersey, whose responsibility it was to certify the technical ability and plant capacity of firms bidding on Signal Corps' contracts and to approve any technical changes in contract specifications. The approval of this department was a prerequisite to receiving an award. Defendant, Harrison F. Tryon, was chief of the Logistics Engineering Division at Fort Monmouth and was a direct subordinate of Laverick's, as well as the custodian of lists containing the specifications of all component parts used in these contracts. Defendant, Mal-

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[1] The relevant provisions are as follows:

§2 Title 18 U.S.C. provides that one who aids or abets the commission of a crime is guilty as a principal.

§202 Title 18 U.S.C. proscribes the receipt of money by an employee of the United States with the intent to have his decision influenced with regard to a matter before him in his official capacity.

§281 Title 18 U.S.C. punishes an employee of the United States who accepts compensation for services which he renders in relation to a matter in which the United States has an interest, before an agency of the United States.

§371 Title 18 U.S.C. prohibits any conspiracy to commit an offense against the United States.

colmn Schaeffer, was a former employee of Laverick's department and later a manufacturer's representative of Consad, Inc., in their attempts to secure contracts with the Government at Fort Monmouth, New Jersey, from March through May 26, 1962, when a retainer of $250 per month was cancelled, but nevertheless, Consad continued getting in touch with him thereafter. Consad, Inc., was an electronic components manufacturer which had, at the time of the alleged crime, a series of bids pending before the Signal Corps at Fort Monmouth, New Jersey. Consad, Inc., had experienced great difficulty in obtaining Government contracts because of its inability to convince the Signal Corps of its capacity to manufacture the finished product.

The facts, briefly stated, are as follows:

Robert Snoyer was president of Consad, Inc., and on June 6, 1962, was in New York City when he received a wire from his office in Santa Monica, California, concerning a certain bid his company then had pending at Fort Monmouth, New Jersey. In order to obtain the requested information, Snoyer attempted to get in touch with his Santa Monica plant, as well as his Monterey plant in California, but was unable to find anyone at either place who could give him the requisite information. He then called the defendant, Schaeffer, at Fort Monmouth, and told him of the wire he had received, and asked him to check into the matter and see if he could identify the equipment. Schaeffer indicated that Snoyer would have the same difficulty he had had in the past with the people at Fort Monmouth, and told him that if he hoped to obtain any business, he would need the help of certain people at Fort Monmouth, and that for a fee of 2% of the contract price he could expect to receive all the approvals necessary to obtain the contract.

Snoyer told him that he would want to meet the principals involved who could deliver the contract and the approvals. Schaeffer told Snoyer that he would come to New York the next morning and he would introduce him to Laverick who was the one who could be most helpful in securing the contract. Schaeffer came to New York on June 7, 1962, and he and Snoyer drove down to Laverick's home and there Snoyer asked Laverick to confirm Schaeffer's statement that what he told him was true and Laverick replied, indicating Schaeffer, "You do what Muggsy tells you to do and everything will be O.K. . . ." To this, Snoyer, answered, "All right." Later, when they were about to leave, Snoyer being somewhat doubtful about the money concerned, since on the way down to Laverick's home Schaeffer had reduced the price from 2% of $2,500,000, or $48,000.00, to $20,000.00 as the amount of the payment, and therefore asked Schaeffer whether Laverick knew about this and was still willing to go through with the deal. Schaeffer thereupon walked apart from Snoyer and whispered something to Laverick which Snoyer testified he could not overhear, but that he heard Laverick's reply, "Yes, you're damn right I will.", and Schaeffer, upon returning to Snoyer, came back and said, "You heard him, so everything is O.K."

Schaeffer then drove Snoyer to Philadelphia, and on the way over, he advised Snoyer to call him the next day and he would tell him what he had to do in California, in order to pass the survey which was necessary for the approval of the contract. Schaeffer and Snoyer also had a discussion on how the tax problem on the money to be paid should be avoided and Schaeffer advised Snoyer that it would be necessary for him to take care of his (Schaeffer's) taxes, inasmuch as Schaeffer insisted that the money was

to be paid directly to him and he would make the proper disposition thereof.

From Philadelphia, Snoyer proceeded to Washington, where he confided what had transpired to one Nicodemus, a newspaper reporter, who had been making a study of procurement orders, who told him to contact the F.B.I., which Snoyer did, and, after five hours discussion with the F.B.I., Snoyer left for California, without signing any statement of the conversation which had ensued.

Snoyer called the next day and was told by Schaeffer that he was sending some documents to him which would be very helpful for the company when the survey team came from Fort Monmouth and arrived at Consad's plant. After Snoyer's arrival in California, he was contacted by the F.B.I. of Los Angeles, and he reported to them that he had received a package from Schaeffer which he brought to the Santa Monica office of the F.B.I. and it was found to contain some provisioning lists and item description lists taken from Signal Corps files. Further testimony showed that these lists were not open to the public, were confidential, and were given to the defendant, Laverick, by the defendant, Tryon, through Tryon's secretary.

After the receipt of these documents by Consad in California, which were sent by Schaeffer and taken to the office of the F.B.I., a series of telephone conversations were had between Schaeffer and Snoyer, which were recorded by the F.B.I., as well as telephone conversations between Snoyer and Laverick and Snoyer and Tryon. These conversations occurred between June 14th and July 11th, and during one such conversation between Schaeffer and Snoyer, Schaeffer advised Snoyer that he should bring East with him between $4,500.00 and $5,000.00 in cash to be paid by

Schaeffer to four people at Fort Monmouth. Snoyer, however, wanted to meet the principals to whom the money was to be paid and Schaeffer was unwilling, saying that he would distribute the same. However, Snoyer withdrew $3,000.00 from the bank and came East with Agent Stein of the F.B.I., the money being identified at the Newark office of the F.B.I., and placed in envelopes, one of which contained an amount of $850.00, the other $750.00. The testimony shows that the F.B.I. gave no instructions to Snoyer other than he was not to give the envelope containing the money to anyone, unless the one receiving it knew it was money, and that there was some basis for the payment of it.

Between June 8th, and June 12th, a survey team, under one Mayerson, visited the Consad plant in California, and made a technical ability evaluation to determine whether it could technically produce the equipment upon which it had bid. A report was filed by the survey team, under Mayerson, stating that Consad was not qualified, and Laverick, though he had authority to overrule the report, did not so do. Snoyer, at this time, was unaware of this conduct on Laverick's part. The Contractor Evaluation Board, the highest authority, with respect to contracts of this nature, also approved the report. Later, Snoyer, upon learning of the unfavorable report which the survey team had made, was assured on or about June 15th, by Schaeffer that certain of the information of the survey team was in error and told Snoyer, "Well, don't worry about that because Bill will overrule them. Don't concern yourself with it." He also advised Snoyer that there were various details that were wrong with Consad's facilities and that was the reason they could not give technical approval, but Schaeffer again assured Snoyer, ". . . that these people would be overruled."

*Appendix A*

An F.B.I. Agent, Colby, testified to a telephone conversation between Snoyer and Tryon on June 20th, in which Tryon stated he was familiar with the entire matter and that he would be able to help Consad after the award was made and that he had already helped, to some extent, with Schaeffer. On July 12, 1962, arrangements were made by Schaeffer for Snoyer to have dinner at the Shadow-Brook Restaurant in Shrewsbury, New Jersey, with Tryon and Laverick and other Fort Monmouth personnel. Snoyer testified, however, that at this meeting Laverick assured Snoyer that the Small Business Administration, which had authority to overrule everything which had gone on before, would grant Consad a Certificate of Competency. He, additionally, assured Snoyer that he was helping all he could with Consad, as was Tryon, and when they had secured the contract, he would make it profitable by ordering spare parts. Snoyer testified that out of the presence of the other persons, he showed Schaeffer the cash he had brought by exhibiting the envelopes containing the cash to him. Schaeffer, likewise, knew at this meeting that the survey team had reported that Consad was technically unqualified to perform the work under their bid. Later in the evening at the Shadow-Brook Restaurant, when Snoyer visited the men's room with Laverick, upon leaving he handed one of the envelopes to Laverick which contained the cash and asked him if he thought he deserved it and Laverick said, "Yes." Later, Snoyer took the defendant, Tryon, aside in the bar, showed him the envelope with the money in it and asked him if he thought he deserved it and he answered, "Yes." Snoyer then gave the envelope to him and Tryon folded it and put it in his pocket. Immediately upon defendants leaving the restaurant, they were arrested which, as has been indicated, was on July 12, 1962.

*Appendix A*

This evidence was presented to the jury, the defendants moved for judgments of acquittal after the Government's case and also after their own case had been presented and both of these motions were denied. After summation of counsel, the case was submitted to the jury which rendered a verdict for the Government and against all three defendants. A motion for a new trial was denied on February 26, 1964, and this appeal followed.

The first reason advanced by the defendants for the new trial is that the charge of the court on entrapment was improper because (1) it did not make any reference as to whether or not there was any "predisposition" on the part of the defendants to commit the crime charged; (2) that the charge of the court with respect to Snoyer being a Government agent was insufficient, and, finally, that the court's use of the phrases "lawful entrapment" and "unlawful entrapment" was prejudicial to the defendant.

At the outset, it may be stated that a careful review of the record indicates plainly that there was no necessity for the court to charge with respect to entrapment. The record clearly shows that the unlawful scheme was conceived in the minds of the defendants, Schaeffer and Laverick, and materially aided by Tryon, and presented to Snoyer, and that everything thereafter done by Snoyer, in cooperation with the F.B.I. agents, was only taking advantage of an opportunity for wrongdoing that they presented and afforded.

While defendants, in their argument and brief, admitted that they do not set out effectively their objection to the court's charge on entrapment, they now assert that the court was in error in not using the specific word "predisposition" in setting forth the requisite state of mind that

should obtain on the part of the defendants in any case of entrapment. However, it is plain that the trial court, in explaining the law of entrapment to the jury, was not bound to use any specific word and, while the court did not mention "predisposition", it did use phrases such as "implants in the mind of an otherwise innocent person", "already disposed . . .", as well as "already has the readiness and willingness to break the law", and similar phrases synonymous therewith. It is obvious that these phrases throughout the court's charge were interchangeable with the specific word "predisposition".

Furthermore, the court stated as follows:

> "You are instructed that entrapment is present when the criminal design originates with an officer or agent of the Government and he implants in the mind of an otherwise innocent person the disposition to commit the offense and induces its commission in order to create the grounds for prosecution. You are further instructed that entrapment is not present when the criminal intent originates in the mind of a person already disposed to the commission of an offense, and the officer or agent of the Government does nothing more than afford that person the opportunity to commit the offense."

Furthermore,

> "By way of summary as to this defense of entrapment, I charge you that the law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by a law enforcement officer to commit a crime, he is entitled to the defense of unlawful en-

> trapment because, as I have mentioned, the law as a matter of public policy forbids a conviction in such a case, but on the other hand if a person already has the readiness and willingness to break the law, the mere fact that Government agents provided a favorable opportunity is no defense. This is lawful entrapment."

With respect to the second assertion that the charge with respect to Snoyer being a Government agent was insufficient, it is likewise without foundation. It is obvious that a private individual may only be an entrapping party when an agency relationship exists between himself and the Government. The record herein displays no evidence to support any agency relationship between the Government and Snoyer at the time of the formation of the nefarious scheme and the court's detailed charge, concerning when entrapment is perpetrated by an officer or agent of the Government, was as full and complete as the record warranted. Additionally, a long and intensive cross-examination of Snoyer by defense counsel elicited nothing which could possibly be construed as making Snoyer a Government agent in any entrapment proceeding. This for the reason that Snoyer had no relationship with any Government official until after Schaeffer solicited the payment of money to him, and it is uncontradicted that Schaeffer arranged the meeting with Laverick at his home at which time the plan was perfected and which Tryon later on materially aided.

With respect to the third contention, while the adjectives "unlawful" and "lawful" entrapment might have been somewhat of an over-portrayal in describing the conditions requisite for entrapment, nevertheless, the thought

clearly and carefully embodies that which is necessary and proper under the law. *Sherman* v. *United States*, 356 U. S. 369; *Accardi* v. *United States*, 257 F. 2d 168; *Park* v. *United States*, 238 F. 2d 253; *United States* v. *Romano*, 278 F. 2d 202. Accordingly, it is obvious that the phrases "lawful entrapment" and "unlawful entrapment" comport with the language used by many appellate courts in describing entrapment and the trial court's charge with respect thereto was clear and sufficient.

The basis for the defendant's averment of entrapment, as has been indicated, is that Snoyer sought to lure the defendants into the wrongdoing in order to justify Consad's lack of success in obtaining the Government contracts. All of the facts, as we shall point out in connection therewith, were before the jury and Snoyer vigorously denied any assertion of allurement on his part, or that the telephone calls in July, previously adverted to, were designed with any thought of entrapment. These telephone conversations, in their entirety, show beyond a doubt that they belie any theory of entrapment on the part of Snoyer as a Government agent, but clearly point up only part of the strategem used to afford an opportunity for all of the three defendants to carry out their scheme of wrongdoing. As has been indicated above, the nefarious scheme was broached and implanted in Snoyer's mind by the defendant, Schaeffer, on June 6, 1962, when he stated that for a fee of 2% of the contract price, Snoyer could expect to receive the favorable approval at Monmouth which was necessary to the securance of the contract, all of which was aided and abetted by Laverick and Tryon, as herein indicated, and, accordingly, it cannot be reiterated too often that all the F.B.I. did was to afford an opportunity through Snoyer for the defendants to commit the crime charged.

*Appendix A*

Another argument advanced by the defendant is that the charge of the court, in its summary, was one-sided and emphasized the Government's case to the exclusion of the defendant's case. Here, there was no objection to the court's charge with respect thereto at the close of the case and whatever warrant there is to this assertion must be found under the Plain Error Rule of Rule 30. There was denial by the defendants of all the allegations of the Government's witnesses and the contentions of both parties were properly laid before the jury, and a careful scrutiny of the record shows no prejudice in the court's charge, for it is abundantly clear that the court lent equal weight to both the evidence produced by the Government, as well as that produced by the defendants.

The next objection raised by the defendant is that the court permitted certain questions to be addressed to the defendant, Laverick, which were prejudicial to him before the jury. One of the objected areas involved the cross-examination of Laverick with respect to his savings account and investments, while the other dealt with his ownership of a race horse. However a reading of the record shows that on direct-examination Laverick was questioned as to his financial situation and opened the door for the questions posed on cross-examination and were asked to test his credibility with respect to his financial situation and, accordingly, proper. The facts in this case pose nothing of the situation presented in *Berger* v. *United States,* 295 U. S. 78, at 84, where the Government exceeded the bounds of cross-examination in large measure by permitting to go to the jury incompetent hearsay evidence. There was ample basis here for the cross-examination involved. Again here, it was the defendant's own objection which prevented the Government from proving the allegations in connection with

his large purchases of stock and a race horse and, accordingly, no prejudice resulted since the court, in its charge, said: "I further charge you that whenever the Court has sustained an objection to the question you may draw no inference from the wording of that question or speculate as to what the witness would have said if permitted to answer, nor can you assume that any party has objected to a question because that side expected the answer, if any, to be unfavorable." Accordingly, if any prejudice could have properly accrued to the defendant by this question, it was cured by the court's charge.

Finally, certain objections were raised as to the sufficiency of the indictment. However, an indictment should be construed broadly in favor of the Government after a verdict has been rendered thereon. *Hagner* v. *United States*, 285 U. S. 427, at 431. This rule is particularly applicable here where the defendant made no specific objection to the indictment by means of any pre-trial motion. However, objection is urged to the indictment here that it was insufficient, in that each count in Count I and II alleged the statutory offense in the disjunctive or alternative. Here again, counsel is urging, for the first time, this specific objection. The cases are unanimous in holding that merely technical defects are waived when no objection is made to them at trial. Rule 12(b)(2). What is really here adverted to is that the indictment is duplicitous, to which the Government answered that there is, in fact, no duplicity, nor did any ever exist, as there is no danger in the allegations that a conviction or acquittal of the defendants would fail to bar a subsequent criminal prosecution on the grounds of double jeopardy. The essence of the crime here charged is the receiving of the money, not the quid pro quo received or promised for that money, and where the statutes use the

disjunctive to describe the alternate means of committing the same statutory offense and only one crime is charged, the means of commission are permissible. *United States* v. *Johnson*, 207 F. 2d 314.

The other reasons asserted for a new trial are without merit.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

# APPENDIX B

## Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NOS. 14874, 14875 AND 14876

---

UNITED STATES OF AMERICA,

*v.*

WILLIAM J. LAVERICK,
HARRISON F. TRYON and
MALCOLM SCHAEFFER.

WILLIAM J. LAVERICK,
Appellant in No. 14874

HARRISON F. TRYON,
Appellant in No. 14875

MALCOLM SCHAEFFER,
Appellant in No. 14876

(D. C. Criminal No. 537-62)

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ——— DISTRICT OF NEW JERSEY

---

Present: STALEY, GANEY and FREEDMAN, *Circuit Judges.*

*Appendix B*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ——— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the District Court, filed March 17, 1964 and entered March 19, 1964, be, and the same are hereby affirmed.

ATTEST:

M. ELIZABETH FERGUSON
Deputy Clerk

July 15, 1965